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ABSTRACT

This newsletter defines common law negligence, discusses recent trends in common law negligence, cites litigation, and establishes guidelines to assist school administrators in the avoidance of such tort action. The success or failure of a negligence suit most commonly turns on one of three factors: duty, breach of that duty, and proximate cause between the breach and the injury. Whether or not the duty was breached by the defendants is the key issue in school cases. The courts are unresolved concerning third parties inflicting injuries on students on school grounds. Before getting to litigation, school administrators, as appointed state officials, have a duty to protect the state. The policies they design to avoid neglience must include a signed release of liability by students and parents; a review of safety procedures; a staff alert to possible hazards in curricular and extracurricular school-related activities; appropriate warnings posted in shops, and in parking and other areas; and principals' approval of all field trips and modes of transportation. (JAM)

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A Legal Memorandum

FEBRUARY 1989 *National Association of Secondary School Principals* ISSN 0192-6152

An Update on Negligence

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A Legal Memorandum

FEBRUARY 1989 *National Association of Secondary School Principals* ISSN 0192-6152

An Update on Negligence

Recent years have witnessed the emergence of a number of new sources of litigation against schools and school administrators, but one of the major sources continues to be the common law action for negligence.

Suits based on this theory in which a plaintiff can show that the result was serious physical or emotional injury represent the kind of legal actions that can result in the largest damage awards against school defendants. For this reason it seems worthwhile to review the legal background of negligence, updating our last *Memorandum* on this subject (December 1980), and discussing some new aspects of the subject that have emerged in the intervening years.

"Negligence" is one of a number of legal concepts belonging to that part of the law known as "torts." The dictionary says that a tort is ". . . a wrongful act, not including a breach of contract or trust, which results in injury to another's person, property, reputation or the like, and for which the injured party is entitled to compensation."[1] This definition is admittedly somewhat vague because the concept was intentionally created to be a flexible one capable of change and growth to meet changing circumstances.

Torts may be both intentional and unintentional. Some of the most common are assault and battery. Some of these actions may also be crimes, of course, or actions that are subject to prosecution by the state. When these acts form the basis for a civil action for damages by the person injured, however, they are torts.

Legal actions claiming injury as the result of intentional torts by school administrators are relatively rare, and are most often alleged batteries based upon the administration of corporal punishment to students.

By far the commonest tort actions, however, are that group of unintentional acts known as "negligence." Negligence is defined by the dictionary as ". . . the failure to exercise that degree of care which, under the circumstances, the law requires for the protection of other persons . . ."[2]

Again, the concept of "negligence," like that of "torts" is a broad one, capable of broad application in a variety of circumstances. As with the concept of torts itself, this breadth was intentional, a means of assuring individuals who believed themselves to be the innocent victim of another's act or omission, even if unintentional, of a legal means of being compensated for their injury.

During the many years in which the concept of negligence has been applied, plaintiffs and their attorneys have demonstrated considerable skill in finding new ways to apply it, and schools and educators have not been exempt from these applications. Some recent applications will be discussed after a brief review of the basic elements of negligence.

Elements of Negligence

For a plaintiff to prove a claim of negligence, he or she must present evidence of four separate elements:

1. A duty of care must have existed between the plaintiff and the defendant
2. The defendant must have breached that duty
3. The plaintiff must have been injured
4. The defendant's breach of duty must have been the proximate cause of plaintiff's injury.

Each of these elements has a long legal history, and many cases turn on whether one of them can be satisfactorily proven or not. In most cases, the issue of injury is the least questionable, especially when that injury is physical. Emotional injury, though more difficult to prove, is also allowed as a compensable form of injury. Originally, emotional harm had to be accompanied by physical injury in order to be compensable. In more recent years, however, such harm can form the basis of a tort action by itself and can, in some cases, prove as costly as many kinds of physical injury.

Duty

The success or failure of a negligence suit most commonly turns on one of the other three factors: duty, breach of that duty, and proximate cause between the breach and the injury. Basically, a duty exists between two people when the relationship between them is such that one is obligated to exercise at least ordinary care that the other person not be injured. Whether a duty exists between a plaintiff and a defendant is particularly impor-

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tant in a negligence case, because unless that is established, the case can proceed no further.

In cases in which the plaintiff is a student (or parents suing on his or her behalf) a duty is often found to exist if the injury merely occurs at school. Teachers, administrators, coaches, and activity advisers are all presumed to have a duty to exercise at least ordinary care for the health and welfare of students whose activities they are conducting or supervising. There are exceptions, however.

One of the areas in which the scope of duty has often been an issue in school cases has concerned students injured on school property before or after the school day officially begins. In one well-known case, for example,[3] a 13-year-old student severely injured the eye of a 9-year-old with a paper clip fired from a rubber band.

The accident occurred on the grounds of the elementary school where the older boy was waiting for the bus that took him to his school each morning. Evidence showed that the elementary school principal arrived at the school each morning at 8:00 a.m. and was aware that a number of students arrived there before that time, including the older ones awaiting their bus.

The doors of the school opened each morning at 8:15 and students were expected to be in their seats by 8:30. The accident occurred at 8:05. In this situation the court found that a duty to the injured plaintiff existed, but the court made it clear that it might not have, had the facts been slightly different.

The success or failure of a negligence suit most commonly turns on one of the other three factors: duty, breach of that duty, and proximate cause between the breach and the injury.

Other school situations in which the key issue is whether or not a duty exists are those in which a student is injured away from the school's property, but when the student is allegedly exposed to the risk because of the school's program. Clearly, this will be the case when the student is involved in an interscholastic athletic contest at another school, or on the bus going to or from school. Usually, however, before or after the student boards the bus at the home end of the line, the school's duty ends.

Thus, in a recent case in which a student was injured by a rock thrown by another student as he stood waiting for the bus to take him to school in the morning, a New York court dismissed the case on the ground that the school had no duty to protect the student.[4]

In another recent case, no duty was found to exist where the student plaintiff was struck by an automobile while away from school without permission. To hold a school and its staff responsible for such an injury merely because they failed to prevent the student from leaving school was regarded as an intolerable burden.[5]

Breach of Duty

Even more often than whether a duty exists, the key issue in school cases is whether or not the duty was breached by the defendants. It is important to note that a breach of duty can be either an action or an inaction. In the school context, particularly where the defendant is an administrator, the alleged breach of duty is more often an omission to act than it is the commission of an act.

This is the standard situation in which the essence of the plaintiff's claim against the administrator is a failure of adequate supervision. Often the defendant administrator was not even present at the time and place of the injury; the sole basis of the claim against the administrator is his or her failure to have taken some earlier action that might have prevented the injury from occurring.

In this connection, it is important to note that no one is automatically liable for the tortious actions of another, and school administrators are therefore not to be held liable for the negligent conduct of teachers or other staff members under their supervision.

Some administrators misunderstand the law on this point because they have heard of a legal doctrine called *respondeat superior*, which requires employers to be responsible for some of the acts of their employees. But school administrators are not normally employers of the staff members they supervise (unless the administrator actually owns the school). So if this doctrine applies at all, its applicability will be limited to the school district itself, and not to its administrators.

The duty of the principal or other administrator, then, is to provide adequate supervision. It is for a failure to perform this duty that he or she can most often be held liable for the tort of negligence. Whether such a breach of duty has, in fact, occurred can often be the most difficult issue to determine in cases alleging such negligence.

During many years of trying to make this determination, the law has developed a concept known as the "reasonable man," or "reasonable person" by which to test a specific defendant's conduct. As applied to a school administrator the concept would ask: under the same circumstances that this defendant confronted, would a reasonably prudent administrator have acted as this one did?

The answer requires analysis of a number of factors. Normally, it entails consideration of the physical, mental,

and emotional attributes of the defendant, and the minimum level of information and experience common to the community in which he or she works. Obviously, the defendant cannot be expected to perform as a person of exceptional strength, intelligence, or with attributes others might have. The defendant is expected, however, to have performed as one possessing his own attributes could have.

Defendants who are professional persons, such as school administrators, however, will be held to a standard based on the skills and training they should have acquired in order to hold themselves out as school administrators, and this standard will be higher than that which would apply to ordinary citizens. In short, the court or jury considering a charge of negligence against a school administrator will be asking: did this defendant behave as a reasonably prudent school administrator in this position would have behaved?

Answering this question requires not only a consideration of the characteristics of the defendant, but also of all the circumstances of the situation in which the plaintiff claims injury. These circumstances are as limitless as the number of situations that can give rise to an injury, but certainly some that must be examined are: the age and maturity of the plaintiff, the nature of the risk to which he or she was exposed, and the precautions that were taken by the defendant to avoid injury. To understand this matter better, it helps to look at the facts of a particular case.

In most cases, the issue of injury is the least questionable, especially when that injury is physical.

In the previously described case in which the student was injured by a paper clip that struck him in the eye, the appellate court said of the principal:

> He had not announced any rules with respect to the congregation of his students and their conduct prior to entry into the classrooms. He had assigned none of the teachers or other school personnel to assist him in supervising the students and he undertook the sole responsibility. He then failed to take any measure towards overseeing their presence and activities, except at the point of the milk delivery and by walking from east to west around or through the building. When he was walking through the building there was no semblance of supervision on the grounds outside and that was precisely when the injury to Robert occurred. Before then Lindberg [the aggressor] had been fooling around and had struck another student while no supervisor was anywhere about. Bearing all of these circumstances in mind, it clearly cannot be said that the finding that Smith [the principal] failed to take suitable supervisory precautions lacked reasonable support in the evidence.[6]

Proximate Cause

The fourth element that must be proven in a negligence claim is "proximate cause" between a defendant's conduct and the injury to the plaintiff. Often this element is very closely entwined with the issues of whether a duty itself existed and, if so, whether that duty was breached. Thus, in one case in which an elementary school teacher was held free of liability when one of her students was struck by a car while on the way home during lunch recess, the Supreme Court of Ohio based its ruling on a lack of proximate cause, and the issue of whether the teacher had breached her duty to the student was not even discussed.[7]

In a case in which a student drowned while swimming in a lake at which a class picnic was held, the principal had been advised of the trip in advance and gave his approval to it. With regard to swimming, the students were advised that they would have to provide their own lifeguard. The court held that the principal was not liable for negligence because he specified certain conditions under which the trip might be made and these conditions were appropriate.

While a duty was recognized as existing, the principal was regarded as fulfilling that duty. Despite the fact that the cause of the student's death was regarded as being likely to have been his own negligence in swimming in an area of the lake that was not under supervision, the Kentucky court did not discuss the possible absence of proximate cause as a basis for its finding of no negligence on the principal's part.[8]

In another case in which a student was killed in a collision with a truck while driving home from an off-campus senior class party, the student had allegedly been drinking alcoholic beverages at the party and was found to have had alcohol in her blood when the accident occurred.

The basis of the claims against school defendants was their alleged failure to prevent the party and the ensuing automobile accident after the faculty adviser had arrived at a class meeting at which the party was being planned for a senior "release day." Upon hearing mention of plans to obtain beer for the party, the adviser admonished the students and reported the incident to the principal, but no school district employees were assigned to monitor the party and none attended. In affirming the dismissal of the plaintiff's claims of negligence, the Washington State court of appeals concluded that mere knowledge of the party by the faculty adviser and principal did not bring the party "within the scope of the District's authority" and could therefore not make the district liable.[9] Presumably this means that no duty existed on the part of the district.

Foreseeability

Because of the difficulty in separating out some of the elements that make up the tort of negligence, the courts have developed a test to help them determine whether or not a defendant should be held legally accountable in such a suit. In addition to application of the so-called "reasonable person" test, the court will ask whether such a person could have been expected to foresee the result of his or her conduct under the circumstances. If the facts and circumstances lead the judge or jury to conclude that the injury could have been foreseen and was not, or having been foreseen, that appropriate action was not taken to avoid it, the defendant will be found negligent.

This test makes it unnecessary to analyze each of the four elements of negligence independently. While this formulation seems reasonable on its face, the test's application in school cases can often place a heavy burden upon principals and other school administrators.

Even more often than whether a duty exists, the key issue in school cases is whether or not the duty was breached by the defendants.

In a well-known California case, for example, a 15-year-old student was injured when, along with other members of her physical education class, she ran from the gymnasium to a playing field. As the student ran, she was struck by a garbage truck that was proceeding on a road on the school grounds at a speed of 25 miles per hour.

Despite the fact that no other child had been injured in seven years during which students had been running from the gym to the playfield, the court ruled that the administrators were negligent in that they knew of the presence of trucks on the school grounds and failed "to take precautions to minimize the danger of injury to the students . . . other than to issue an instruction to the custodian of the grounds and to caution people to drive carefully. They failed to post a danger sign or to warn students against running across the courtyard."[10]

If principals or other school administrators are expected to foresee harm in a given situation even though it has never occurred before, it should not be surprising that they will be placed in an even more precarious situation if an injury occurred in the same or similar circumstances before, and they knew or should have known about it.

Thus, in an Illinois case in which students on a class trip to a Chicago museum were attacked and injured while visiting the museum, the school district and its staff were not held liable for negligence because the attack by non-students inside the museum was not held to be reasonably foreseeable. The court made it quite clear, however, that were such an incident to occur in that museum *again*, liability would very likely be assigned unless the district had taken considerably greater precautions to avoid it than it had in the case at bar.[11]

Clearly, the doctrine of foreseeability places a heavy burden upon administrators in a community even though they are in different schools—to be aware of situations that have given rise to injury, especially if such an injury resulted in litigation about which plaintiff attorneys are apt to be aware. It goes without saying that administrators are going to have to pay far more attention to any condition or set of circumstances that has caused injury within their own schools.

Finally, it should be noted that the dependence of many negligence cases on the specific facts of the situation makes it very difficult for defendants to secure a dismissal prior to the costly process of fact-finding and often a full trial. So, even if the defendants ultimately prevail, the cost of victory may be high. Where injury is obvious and extensive, the sympathies apt to be aroused in a jury—especially if governmental entities like public schools are involved as defendants—makes the risks of trial even higher and helps to more easily explain the tendency of such defendants and their insurers to settle cases before trial.

Risk Avoidance and Defense Against Liability

Obviously, the best way for administrators to avoid liability for negligence is to take the steps necessary to avoid injury in the first place. Such "risk-avoidance," as it is known in the insurance industry, should be the administrator's first line of defense not only from the legal and financial point of view, of course, but more importantly because it protects the health, safety, and welfare of students and others coming under the administrator's supervision.

Some risks can only be avoided by eliminating activities entirely, and in some cases, such as the use of trampolines in gym classes, this approach may be warranted. Administrators must be careful, however, that in the interest of safety or risk-avoidance, they do not harm the educational process that they are charged with carrying out. They must remember that every profession entails some degree of risk, and that all this risk cannot be eliminated if professional duties are to be met.

Fortunately, a large part of the risks inherent in school administration can be avoided by following the basic rules that the law of negligence provides: *think through*

any situation in advance to be aware of the risks and dangers it presents, then take whatever action is appropriate and reasonable to eliminate those risks.

Despite even the most careful forethought and planning, however, accidents will occur and injury will result. When it does, lawsuits may well follow. In most cases, though, if the administrator behaved "reasonably," the courts will not find the requisite elements for a negligence claim to exist. If they do, however, the law does allow a few defenses to overcome that liability.

Immunity to Suit

Long ago, when the state was the implement of regal policy in England, it was held to be immune to suit because "the King could do no wrong." When the English legal system was brought to America, this doctrine was applied to the state and federal governments as a doctrine of "governmental immunity." This doctrine still exists, and where it does, it applies to public school districts. However, to a large extent, the doctrine has been eroded by legislative action, or judicial decision.

Even where it still exists, however, the primary purpose of governmental immunity is to protect the state itself and those elected and appointed officials charged with shaping and guiding its policies. The doctrine has not usually been applied to cover state employees responsible for carrying out those policies. In regard to public schools, therefore, governmental immunity will protect the school district itself and the members of its administering board. It may even be interpreted as protecting the district's chief executive, the superintendent, but employees below that level will usually be subject to liability for any negligence in the conduct of their official duties.

Affirmative Defenses

Affirmative defenses are those that the law recognizes as excusing a defendant from liability even in those situations in which the four elements of negligence are found to be present. The two most important of these defenses are known as "contributory negligence" and "assumption of the risk."

Contributory negligence, as the name implies, is conduct by the plaintiff that seems to have contributed to his or her own injury and that seems careless enough to constitute "negligence" in itself. Logically, of course, this reasoning is somewhat flawed since a person has no legal duty of care toward herself or himself. But the intent of the doctrine is clear.

To take the simplest example, a driver of an automobile will not usually be held liable for a collision with another vehicle, the driver of which was intoxicated, even though the sober driver may have been, in some way, negligent in his conduct.

In school cases, however, the doctrine of contributory negligence has been considerably limited in recent years, especially where the injured plaintiff is a student. While not an absolute bar to the defense, the law recognizes the immaturity of youth as a limitation on the degree to which a student can be regarded as responsible for his or her own behavior, and the younger the student the less likely contributory negligence will be available as a defense.

In many states, this defense is likely to be completely unavailable in cases involving plaintiffs under 13 years of age and in cases of somewhat older students, its utility may be limited. Thus, in a case in which a 14-year-old boy was injured while using a circular saw in wood shop, even though it was shown that the student had been told not to operate the machine, the Court denied the defense of contributory negligence, ruling that the boy was not told *why* he should not use the machine, and that it was well known that boys of this age often will not obey an instruction without being given an accompanying explanation.[12]

Assumption of the risk differs from contributory negligence in that it does not require proof that the plaintiff's conduct is reckless or irresponsible. It only requires a showing that the plaintiff knowingly and willingly placed himself in the position in which he was exposed to the risk of the injury that occurred.

The primary purpose of governmental immunity is to protect the state itself, and those elected and appointed officials charged with shaping and guiding its policies.

The most common cases in which the doctrine is invoked are those involving sports or other athletic activities. Participation in tackle football, for example, obviously entails some risk of injury, and claims based on such injury may well be barred by the assumption of the risk doctrine unless the plaintiff can show that the particular injury sustained was not one that he could have reasonably anticipated, or that the conduct of the defendants was so willful and wanton as to override the protection afforded them by the assumption of risk by the plaintiff.

Even where the doctrine properly applies, however, administrators should be aware that the burden of proving it is upon the defendants and that they must show the presence of three separate elements to make their case: that the plaintiff knew or should have known of the risk

he was assuming; that he understood the nature and quality of that risk; and that he had sufficient time, knowledge, and experience to be able to choose to avoid the danger.

As in the case of contributory negligence, it can readily be seen that these elements may be difficult to prove in cases involving very young students.[13]

Release of Liability

Many, if not most school districts employ some kind of release of liability form that students and their parents are asked to sign. These forms state that the district is released from any and all liability that might be sustained through participation of the student in some named activity.

Despite the widespread use of such forms, there has long been considerable doubt among lawyers as to their effectiveness. Clearly, the parent cannot waive any right the student might have to reasonable care to which he is due from the district and its employees. And there is equal doubt that the student, as a minor, could waive his own rights, at least unless he could be shown to have a very clear understanding of the nature of the risks involved and the effect that releasing those rights would have. Despite these concerns, there have been few reported decisions involving the issue and until recently, none issued by an appellate level court.

A state Supreme Court (Washington) has now confronted the issue, not in a tort case, but in a direct challenge by parents and students to the legality of a public school's requiring the execution of such forms as a condition of participation in interscholastic athletics. The court reviewed all the issues underlying the use of releases, including the responsibility of the schools and their personnel and the general recognition by the courts of the legality of such releases in normal contractual relationships between private parties.

The court then observed, however, that where the service provided by one party to another is of great importance to the public, and the party providing the service has such disproportionate bargaining power as to virtually compel the other party to agree to its conditions, a contract condition may be considered to be without any effect. These factors were found to be present in the case of public school districts conditioning participation in interscholastic athletics upon the execution of releases of liability.

In addition, where the purpose of the release was to free the school district from its recognized legal responsibility to exercise due care in the conduct of its interscholastic athletic programs, the use of the releases was found by the court to be contrary to public policy and therefore null and void.

Finally, the court dealt with the issue of whether the releases could at least be regarded as express statements by students of their assumption of risk, suitable for presentation by defendants as evidence should a claim of negligence arise. On this question, too, the court held that the release could not operate as a total bar against possible future student claims. It left open the question, however, as to whether a release that listed specific risks which the student assumed might not operate to bar claims arising in a case in which injury arose from those particularly listed risks.[14]

Statutory Enactments Affecting Administrator Liability

The Washington decision just discussed is a good example of the way in which court decisions alter the shape and quality of tort liability for individuals and institutions. State and federal legislatures may also affect an area of the common law like the law of negligence, and this has happened with increasing frequency in recent years.

Governmental immunity, discussed previously, was originally a common law doctrine. To the extent that it still exists today, it has often been revised and limited, however, by state statutes. As stated previously, for example, such statutes have often removed administrative employees of public school districts from the doctrine's protection. It has no applicability, of course, to administrators in non-public schools.

Many, if not most school districts employ some kind of release of liability form that students and their parents are asked to sign.

Two-thirds of the states have now enacted legislation requiring school districts (and usually all other governmental units) to defend their employees against suits alleging negligence in the conduct of their official duties and indemnifying them against any damages that may be assessed against them as a result of such litigation. Most of the other states have enacted statutes that at least permit school districts to adopt such policies. Nearly all the states also permit school districts to purchase insurance to protect their employees against such claims and a few require that such insurance be provided.[15]

Administrators should ensure that they know what kind of protection is afforded them under their state statutes, not only because they may sleep better in that

knowledge but also because most of the protections are not automatic. Legal defense by the district, in particular, is often provided only if the employee requests it, often within a rather short period after notice of suit is received. Some of the statutes also have provisions excluding or excepting specific important areas of concern, such as civil rights or criminal actions.

Another important area of legislative intervention into the common law of negligence is the creation of a doctrine called "comparative negligence." This doctrine revises the common law doctrine of contributory negligence discussed earlier, in the belief that the absolute bar to recovery resulting from a finding of contributory negligence was too harsh to injured plaintiffs. Comparative negligence statutes alter this result by permitting the judge or jury to assess the relative fault of plaintiff and defendants and assign damages in proportion to that degree of liability.

In most cases, if the plaintiff is found to be responsible for the majority of the fault, he or she will be entirely barred from any recovery. In at least a few states, however, even where the plaintiff is found to be mostly at fault, he or she may recover from defendants that proportion of his or her legitimate damages for which those defendants are adjudged responsible.

Finally, administrators should be aware that some states have enacted statutes that permit successful plaintiffs to recover all their damages from any defendant or defendants, regardless of the proportion of fault assigned under a comparative negligence statute if other guilty defendants are financially unable to pay their share. These so-called "joint and several liability" laws have been strongly opposed by insurance companies and other large organizations subject to tort suit in recent years, and a number of these statutes have been, or are currently being, withdrawn or modified.

Recent Trends in Negligence Law Affecting School Administrators

Until fairly recently, most student suits alleging negligence against schools and their administrators arose from incidents in which the students were injured as the result of some kind of accident involving the use of school-owned property or equipment. Curricular incidents often involved equipment or materials used in physical education, chemistry, or shop classes. Cocurricular activities such as interscholastic athletics and school-sponsored trips and excursions represented a fair number of suits, but in most cases they, too, were based on allegations of failure to maintain school grounds or equipment in a safe manner, or on inadequate supervision in the use of such equipment.

Suits based on injury of a student by another have occurred, but in most cases the injury was understood by all parties to have been unintended. In recent years, however, negligence actions based on injury to students have become more frequent and the injury sustained by the plaintiff in these cases is admittedly the result of an intentional act.

Another important area of legislative intervention into the common law of negligence is the creation of a doctrine called "comparative negligence."

In some cases, the assailant is unknown to the injured student and therefore cannot be named as a defendant in the suit. Even if he or she is known, however, financial recovery against this third party may be difficult; and even if criminal action is taken against the assailant, this provides no financial recompense to the injured student.

These factors have undoubtedly led to the greatly increased number of suits of this kind against schools and school staff members. Since the attacks, whether physical or sexual, naturally occur at times and places when students are not in class or otherwise directly supervised, the individual school defendants are most likely to be administrators against whom a general allegation of inadequate supervision can be made.

Broadening the scope of injuries recognized as compensable to include both emotional harm and even some more remote kinds of injury such as that to reputation, have further increased the incentives to initiating this kind of litigation.

A brief review of some recent cases will suggest the wide scope of current litigation and the creativity of plaintiffs and their counsel.

In Minnesota, an appellate court upheld a jury's finding of negligent supervision when a white female student was slashed with a knife by a fellow student following class attendance at a documentary film dealing with racial conflict. The film was shown at a private theater, and the injury arose out of an ordinary purse snatching from the plaintiff as she left the theater. The court conceded that the school could not be held responsible for the unforeseeable conduct of other students. Nevertheless, the fact that the school was aware of racial tensions in its community taken together with the subject matter of the film was regarded as sufficient to permit the jury to reasonably conclude that the injury to the plaintiff was foreseeable and avoidable.[16]

While cases involving intentional assaults by third parties have, so far, been more commonly brought against colleges and universities, the number of such cases in-

volving elementary and secondary schools is increasing. And while the courts continue to state as a general principle of law that schools are not the ensurers of student safety, they seem to be becoming more willing to hold the school, if not its individual administrators, liable for these intentional assaults by third parties.

In one recent case, for example, the Supreme Court of California reversed a lower court's refusal to allow a suit to proceed to trial against a university where the female student plaintiff had been attacked during daylight hours by an assailant hiding behind some bushes. The Court allowed that the school could not be held liable for all criminal assaults on its campus but that the student had a right to try to prove that her injuries were caused by the college's failure to trim the shrubbery sufficiently to deter attacks such as that sustained by the plaintiff.[17]

Legal actions claiming injury as the result of intentional torts by school administrators are relatively rare, and are most often alleged batteries based upon the administration of corporal punishment to students.

Another basis of the California Supreme Court's decision was the charge that the college had failed to provide sufficient warnings to students about the risks of assault on its campus. This has been the basis of suits against elementary and secondary schools as well.

In an Oregon case, for example, a student was raped on school grounds at about 6:50 a.m., after being dropped off at school by her mother. The victim asserted that the schools' failure to warn students of the potential danger constituted negligence on its part in light of the fact that a woman delivering newspapers to the school had been raped on the school grounds at 4:30 a.m. only two weeks earlier.

Following that incident, school officials had changed the arrangements for its newspaper delivery, but made no attempt to warn students or their parents about possible danger to them, nor did they alter security measures in any other way. While the trial court directed a verdict for the school, the court of appeals reversed and remanded the case for trial to determine whether the school's conduct constituted negligence.[18]

However, in a similar case in which the school could show that the situation in which the plaintiff was injured had not been an occasion for prior assaults, the court found no basis for holding the school liable.[19]

Where a student is injured by an assault of another student or students, the key issue often becomes whether it can be shown that the attackers had been involved in similar incidents before or threatened such an attack, and if the school defendants knew or should have known of the attackers' dangerous propensities.

Their failure to warn the plaintiff or to take other action to protect him or her from harm may then be found to constitute negligence on their part. This is a charge most likely to be made against principals and other school administrators since they are the school employees most likely to have knowledge of student disciplinary offenses and the responsibility for dealing with them.

A Florida case involved two male students who sexually assaulted a third during a shop class. While the substitute teacher in charge of the class claimed he had been unaware of the attack (because it took place behind some kind of screen) student testimony indicated that the teacher had actually been absent from the class during the attack which had lasted approximately 10 minutes. Evidence also indicated that school administrators were aware that one of the students who perpetrated the attack had been involved in other incidents of sexually aggressive behaviour.

The trial court allowed the case to go to the jury, which found the teacher guilty of negligent supervision of the class, but the court directed a verdict in favor of the school board. On appeal, the appellate court upheld the verdict against the teacher but reversed the lower court's verdict in favor of the board and remanded the case for reconsideration of its liability.[20]

As a result of some success with suits of this kind, plaintiffs and their attorneys have become more and more creative in seeking recovery against schools and their employees but, so far, most courts have resisted most of these efforts.

Thus, in an Arkansas case, the parents of a severely brain-damaged eight-year-old student sued for negligence when the boy hanged himself in the boys' bathroom. The child had been given a pass to go to the bathroom by his classroom teacher, and the suit was brought against that teacher, the school's principal, the district, and its liability insurance carrier on the ground that the inadequacy of the school's safety program was a proximate cause of the student's death.

The state Supreme Court upheld the trial court's dismissal of the claim against the district and its insurer, holding that a school safety policy can only reasonably be regarded as applying to such things as playground apparatus, fire drills, and transportation, and that neither the safety program nor the issuance of the bathroom pass could be regarded as a proximate cause of the child's death.[21]

Probably the most imaginative school suit for negligence was one initiated in Virginia by parents of a high school boy who committed suicide. The parents alleged that their son's death was the direct result of a curse the boy believed had been put on him during a game of Dungeons and Dragons, a fantasy game in which players take on the roles of certain mythical characters.

The game was being played as a part of the local high school's gifted and talented program in which the student was enrolled, and the suit was therefore brought against the teacher in charge of the class, another teacher involved in the game and who had allegedly placed the curse on the plaintiff's decedent, and also against the distributor of the game and its inventor. The essence of the suit was that the game created "extreme emotional psychological distress and emotional pressure" on the student, and that the defendants either knew or should have known this.

Curricular incidents often involved equipment or materials used in physical education, chemistry, or shop classes.

The defendants argued, among other things, that the boy's death was unforeseeable, that his suicide was a voluntary act, and that, in any event, the conduct of all defendants was protected under the free speech provision of the First Amendment of the Constitution. The court agreed with the defendants and dismissed the case, but the parents said they would appeal.[22]

Constitutional torts must be mentioned, although they are not technically tort actions and cannot be fully discussed in this *Memorandum*. This is the group of actions brought under Section 1983 of Title 42 of the United States Code, generally referred to as the Civil Rights Act of 1871.

This statute, initially enacted by the Congress to protect the rights of freed slaves, was rediscovered in the 1960s and has since been applied in a wide variety of circumstances, including some that look very much like simple negligence. The Act provides broadly that anyone acting in a public capacity who denies the civil rights of another may be held liable in federal court for damages. Another federal statute provides that a plaintiff who is successful in this kind of suit shall be reimbursed his or her reasonable attorney fees as well.

The essence of Section 1983 cases that approximate ordinary negligence is that the failure of public defendants such as public schools or their employees to prevent injury to the plaintiff constitutes a denial of a constitutional or civil right, usually the basic right to life and liberty.

Parents of a second-grade child took this approach when their child was strangled and killed on the school grounds during the lunch hour. The assailant was an adult intruder whom a citizen living across the street from the school had seen earlier in the day lurking near the school. The citizen had called to warn the school and spoke to the principal's secretary about what she had seen. The secretary promised to advise the principal of the matter but forgot to do so.

In their suit, the parents claimed that the secretary's omission constituted both ordinary negligence on her part, and a violation of their child's constitutional rights by the district, for which damages could be sought under Section 1983.

The Wisconsin state court ruled against the parents on the civil rights claim because they had a satisfactory means of redress available under the state law—the common law tort claim—but it did not rule on that claim, remanding it for decision by a state court.[23] Although the federal claim was dismissed by the court, this decision was still important because, in some states, no state remedy would have been available at least against the school district itself, as a result of governmental immunity. Under the reasoning of the court in the Wisconsin case, the Section 1983 claim might then have been appropriate.

Similar reasoning would apply to suits against the United States government which can only be sued in situations specifically provided for by the Federal Tort Claims Act. Where that Act did not apply, suits were initiated against the federal government under Section 1983.

One such case was brought by a prisoner who was injured when he tripped and fell over a pillow left lying on a staircase by a deputy sheriff in a federal prison. The prisoner attempted to recover from the United States for his injury, and the case went all the way to the United States Supreme Court. The high court ruled that, even if the federal deputy sheriff had been negligent in leaving the pillow on the stairs and this had been the cause of the plaintiff's injury, it did not constitute a violation of civil rights under the Fourteenth Amendment of the Constitution and "would trivialize the centuries old principle of due process of law." There could therefore be no violation of Section 1983 in this case.[24]

Since the Supreme Court's decision, there have been several school cases in which plaintiffs attempted to use the federal civil rights statute as a vehicle for what appeared to be a common law negligence claim, but most have failed. In a Massachusetts case, for example, a black student football player at a Boston high school was per-

manently paralyzed as the result of being shot while playing in a game against another city high school. He sued the principals of both schools and other city officials alleging that their failure to protect him against the incident that injured him constituted a violation of the Fourteenth Amendment, for which damages were recoverable under Section 1983. Relying on the U.S. Supreme Court's decision the same year, however, the U.S. Court of Appeals rejected the claim.[25]

Still more recently, in a case brought by a group of mothers against a principal and superintendent of a school in which a teacher had allegedly caused physical and emotional injury to their children as a result of corporal punishment, a South Dakota federal district court directed a verdict in favor of the defendants. On appeal to the U.S. Court of Appeals the trial court decision was affirmed on the basis that the plaintiffs would have had to show reckless disregard or deliberate indifference for the constitutional rights of the children on the part of the administrators in order to establish a violation of the federal statute. Ordinary negligence would not suffice.[26]

For a plaintiff to prove a claim of negligence, he or she must present evidence of four separate elements . . . .

Despite this apparent clarification of the law indicating that suits for ordinary negligence are not permitted under the federal civil rights statute, plaintiffs are continuing to seek ways to apply the statute, and they are not overlooking the schools and their administrators as possible defendants. Four cases were initiated recently against the administration of a Pennsylvania high school by female plaintiffs who alleged that while students, they had been sexually abused by the school band director.

The plaintiffs base their claims on a "special relationship" alleged to exist between a school and its students, which gives rise to a higher duty of care than usual, and that failure to exercise that degree of care should be regarded as sufficiently "reckless" behavior to be regarded as a violation of constitutional right protected under Section 1983. One of the cases has been settled by the school district's insurer, and the federal district court has so far refused to dismiss the others. The school district and its administrators have appealed this ruling to the federal Court of Appeals for the Third Circuit.[27]

Endnotes

1. *The Random House Dictionary*, unabridged ed. New York: Random House, 1967.
2. *Ibid.*
3. Titus v. Lindberg, 49 N.J. 66 (1967).
4. Farnaro v. Kerry, 527 NYS 2d 61 (1988).
5. Palella v. Ulsner, 518 NYS 2d 91 (1987).
6. Titus v. Lindberg, supra at 3.
7. Person v. Gum, 455 N.E. 2d 713 (Ohio App. 1983).
8. Cox v. Barnes et al., 469 S.W. 2d 61 (Ky. Ct. of App. 1971).
9. Rhea v. Grandview School District No. JT 116-200, 694 P.2d 666 (Wash. App. 1985).
10. Taylor v. Oakland Scavenger Co. et al., 110 P.2d 1044 (Cal. 1941).
11. Mancha v. Field Museum of Natural History, 283 N.E.2d 899 (Ill. 1972).
12. Lawrence v. Grant Parish School Board, 409 So.2d 1316 (La. Ct. App. 1982).
13. For detailed review of the assumption of the risk doctrine and its status on a state-by-state basis, see Rutter v. Northeastern Beaver Cty., 437 A 2d 1198 (Pa. 1981).
14. Wagenblast v. Odessa School District No. 105-157-166J, 758 P.2d 968 (Wash. 1988).
15. For more detail, see NASSP Legal Memorandum, "Statutory Protection for Principals—Tort Liability," December 1986.
16. Raleigh v. Independent School District, 275 N.W.2d 572 (Sup. Ct. of Minn. 1978).
17. Peterson v. San Francisco Community College District, 685 P.2d 1193 (Cal. 1983).
18. Fazzolari v. Portland School District No. 1J, 727 P.2d 1210 (Or. App. 1986).
19. Cook v. School District UH3J, 731 P.2d 443 (Or. App. 1986).
20. Collins v. School Board of Broward County, 471 So.2d 560 (Fla. App. 4 Dist. 1985).
21. Gathright v. Lincoln Insurance Company, 688 S.W.2d 931 (Ark. 1985).
22. Pulling v. Hutchinson et al., no official report, but reported in The Washington Post, Sept. 20, 1984.
23. Enright v. Board of School Directors of the City of Milwaukee, 346 N.W.2d 771 (Wis. 1984).
24. Daniels v. William, 106 S. Ct. 662, 665 (1986).
25. Williams v. City of Boston et al., 784 F.2d 430 (1st Cir. 1986).
26. Rubek v. Barnhart, 814 F.2d 1283 (8th Cir. 1987).
27. Stoneking v. Bradford Area School District, 667 F. Supp. 1088 (W.D. Pa. 1987).

Guidelines for the Principal

1. An assembly or other meeting should be held periodically in which school rules for the safety of students are reviewed with both students and staff.

2. When instructions or directions for the safety of students in school are issued, the age and ability of the student must be taken into account. If there are any special categories of students for whom different standards would apply (such as physically or mentally handicapped youngsters) special rules may be necessary.

3. There should be no time during the day when each student is not under the supervision of a member of the staff.

4. If your state requires that a certificated person always be in charge of students, appropriate assignments should be made and a record kept of each assignment.

5. The staff should be instructed to report all dangerous conditions so that the principal may take steps to correct them. All such reports should be acted upon immediately.

6. Appropriate warning signs should be posted in shops, parking areas, and other potentially dangerous places.

7. All field trips should be approved by the principal. If there are any questions concerning the trip, the principal should investigate the matter and either disapprove the trip or impose appropriate limitations. Only students whose parents have signed permission slips should be permitted to go on the trip. The slip should indicate an acknowledgment by the parents of the nature of the trip, and the time supervision of students will end. While such permission slips do not absolve school personnel of responsibility for negligence, they are important evidence that the parent had knowledge of, and gave consent to, his child's participation.

8. The principal should consult his school district's attorney as to whether private vehicles may be used to transport students to athletic and other school events.

9. Either by a general procedure, or by specific instruction, the principal should always designate someone to be in charge when he is not present.

10. It should be ascertained from an attorney whether school districts in the principal's state are required by law to pay any judgment rendered against a principal from an action taken in the course and scope of his employment. If not, appropriate insurance should be carried. Such insurance may be offered through the state professional association; it is automatically provided to all NASSP members.

If these rules are followed, the reasonable and prudent principal will have a minimum of legal problems based on injury to students.

From the December 1980 Legal Memorandum

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- "Liability for Off-Campus Injuries," a March 1984 *Bulletin* Legal Brief by Perry Zirkel and Ivan Gluckman.
- "Guidelines To Help Practitioners Stay Out of Court," a November 1984 *Bulletin* article by M. Claradine Johnson.
- "Liability for Campus Security" a May 1987 *Bulletin* Legal Brief by Perry Zirkel and Ivan Gluckman.
- "Statutory Protection for Principals: Tort Liability," *A Legal Memorandum*, December 1986.
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